STATE OF MICHIGAN

COURT OF APPEALS

DAVID W. SMITH,

Plaintiff-Appellee,

v

AVERY LEASING, INC., TIG INSURANCE CORPORATION OF AMERICA, CITIZENS INSURANCE COMPANY OF AMERICA, and TRAVELERS INSURANCE COMPANY,

Defendants-Appellees,

and

NATIONAL SERVICE, INC. and COMMERCIAL UNION INSURANCE COMPANY,

Defendants-Appellants.

UNPUBLISHED
April 12, 2002

No. 228576
WCAC
LC No. 99-000259

Before: Cavanagh, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendants National Service, Inc. (hereinafter "NSI") and its insurer Commercial Union Insurance Company (hereinafter "Commercial Union") appeal by leave granted from the portion of the June 15, 2000, order and opinion of the Worker's Compensation Appellate Commission (WCAC) reversing the magistrate's finding that defendant Travelers Insurance Company (hereinafter "Travelers") was liable for worker's compensation benefits paid to plaintiff during the period from September 13, 1994, to December 21, 1995. We reverse in part and remand.

The parties' stipulation regarding the relevant facts was entered in the administrative file. According to the stipulation of facts, plaintiff David W. Smith filed the original application for benefits in this case in August 1995 on the basis of injuries he received in a vehicular accident while driving a truck in Michigan for defendant Avery. On September 27, 1995, plaintiff filed an amended petition adding defendant NSI. NSI leased drivers to Avery who drove Avery's trucks for the customers who leased those trucks. Plaintiff was unsure whether his actual employer was

NSI or Avery. At the time of the filing of the amended petition, the Bureau of Workers' Disability Compensation's (hereinafter "the bureau") files showed no record of insurance coverage for NSI. The pretrial notice also indicated no coverage for NSI.

Avery informed its attorney, Michael Sanders at Citizens Insurance Company, that its records showed that NSI's worker's compensation insurer was Commercial Union. Sanders attempted to contact Commercial Union, which eventually informed Sanders that although it provided a worker's compensation insurance policy for NSI, the policy only covered claims in Illinois and Indiana. After receiving no response to repeated requests for a certified record of coverage from the bureau's insurance division, Sanders contacted the bureau by telephone in March 1996. During this conversation, he was told that defendant Travelers carried the risk for NSI on the date plaintiff was injured. The bureau also informed Sanders that it would contact Travelers to secure its appearance. Plaintiff's counsel was also informed that this was the case, as evidenced by a letter dated April 29, 1996. However, no notice was ever forwarded from the bureau to Travelers.

Shortly thereafter, Joy Gaw, claims supervisor for Commercial Union, contacted the insurance division of the bureau and was advised that there was no record of coverage for NSI at the time of the accident. The bureau also informed attorneys for TIG Insurance Company and Commercial Union that no coverage existed for NSI. Consequently, no party filed a petition for determination of rights seeking to add Travelers as a party because the last indication from the bureau's insurance division was that Travelers did not insure NSI. Attempts to contact NSI throughout this time were futile because the company was no longer in business.

The matter went to trial in November 1996. On December 19, 1996, the magistrate issued an opinion and order awarding plaintiff benefits for a closed period. She concluded that NSI was plaintiff's employer and that Commercial Union was liable by virtue of its policy with NSI. Both plaintiff and Commercial Union appealed this decision to the WCAC.

However, while the appeal of the magistrate's first decision was pending before the WCAC, plaintiff filed a second petition for benefits alleging a change in his condition. On the pretrial notice sent out in January 1998, the bureau indicated that Travelers was the insurer on the risk at the time of the accident. The pretrial notice also stated that the previous indication of no coverage for NSI was made in error. However, Travelers did not admit coverage following receipt of this notice. As a result, Commercial Union requested coverage information from the bureau, and later forwarded a subpoena for insurance records to the bureau's insurance division. The subpoenaed records, which were received on July 6, 1998, clearly indicate that Travelers was the insurer on the risk for NSI at the time of the accident. Following a check of its records, Travelers confirmed coverage for NSI in Michigan at the time of the accident and notified all parties at a June 25, 1998, hearing.

In the interim, on May 19, 1998, the WCAC issued its order and opinion with regard to the pending appeal. The WCAC affirmed the closed award of benefits and the magistrate's finding that NSI was plaintiff's employer. It also agreed with the magistrate's conclusion that Commercial Union was liable pursuant to its policy with NSI, but only to the extent that it would be liable for similar disabilities under Indiana law. Any residual liability was found to be the responsibility of defendant Avery and its carrier, Citizens Insurance Company, as plaintiff's

statutory employer under MCL 418.171. The WCAC then remanded the matter to allow the magistrate to determine the extent of Commercial Union's liability and to hold Avery liable for the excess. Commercial Union filed a last-minute motion to add Travelers as the proper carrier, but the WCAC denied the motion without prejudice to it being raised on remand before the magistrate.

Following remand, the magistrate sought clarification from the WCAC with regard to the scope of her duties following the WCAC's decision, given Travelers' stipulation to coverage for NSI on the relevant date. Specifically, the magistrate noted in her inquiry to the WCAC that to join the proper carrier, she would have to go beyond the scope of the WCAC's remand instructions. In an order entered November 12, 1998, the WCAC held that "the Commission believes that its order should be modified to permit Magistrate Olivarez to join Travelers Insurance Company as the correct carrier." The parties agreed to submit a stipulated set of facts with regard to the coverage issue in which Travelers expressly stipulated that it was the carrier on the risk for NSI on the date of plaintiff's accident.

On remand, in a written opinion entered May 26, 1999, the magistrate assessed liability for the previous closed award of benefits against Travelers on the basis of its stipulation that it was the insurer for NSI on the date of the accident. Both Travelers and Commercial Union appealed to the WCAC.

In an opinion and order entered June 15, 2000, the WCAC, applying principles of equity, reversed the magistrate's finding that Travelers was liable for benefits originally awarded. Specifically, the WCAC reasoned that it would be unfair to hold Travelers liable where it was not a party to the original action and where Commercial Union had notice of Travelers' potential involvement before the first hearing. The WCAC also found that Commercial Union's failure to join Travelers as a party prevented Travelers from retroactively being held liable because "a party which has not been joined into a compensation proceeding has no obligation to appear, and cannot be held liable absent formal notification that it is a party to the case." The WCAC further found that any culpability on the part of the bureau regarding erroneous information given to the parties did not relieve the original parties from their obligation to join Travelers. The WCAC also concluded that because no party raised the issue in the prior appeal, "liability must stand as it was adjudicated in the Commission's initial decision in this case." This Court granted NSI and Commercial Union's application for leave to appeal in an order entered January 30, 2001.

On appeal, Commercial Union and NSI argue that the WCAC's conclusion that they were fully aware of Travelers' status as NSI's insurer on the date of the accident is contrary to the facts demonstrating that they had only secondhand information, if any, regarding Travelers' involvement. Commercial Union and NSI also contend that the WCAC erred when it stated that the issue of Travelers' potential liability had not been raised in the prior appeal, given that the WCAC's own decision notes Commercial Union's motion to add Travelers as a party, and the commission later permitted the magistrate to add Travelers, "the correct carrier," as a party.

Our review of the WCAC's decision is limited. We must accept the WCAC's factual findings as conclusive, absent fraud, if there is any evidence in the record to support them. MCL 418.861a(14); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 709-710; 614 NW2d 607 (2000). However, we review de novo questions of law involved in any final order of the WCAC,

and its decision is subject to reversal if "it is based on erroneous legal reasoning or the wrong legal framework." *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401-402; 605 NW2d 300 (2000).

We begin our analysis by noting that the WCAC's opinion failed to consider the effect of Travelers' stipulation that it was indeed the carrier on the risk for NSI at the time of the accident. It is well-established that stipulations of fact are inviolable and binding on the parties unless abandoned or disaffirmed, and that a judge or hearing officer may not alter them. *Dana Corp v Employment Security Comm*, 371 Mich 107, 110; 123 NW2d 277 (1963); *Nuriel v Young Women's Christian Ass'n of Metropolitan Detroit*, 186 Mich App 141, 147; 463 NW2d 206 (1990). In this case, the WCAC failed to consider Travelers' express stipulation in its analysis and had no authority to alter or modify it. Further, the WCAC does not have equitable powers. *Delke v Scheuren*, 185 Mich App 326, 332; 460 NW2d 324 (1990). However, a review of the WCAC's ruling confirms that it formed its decision that Travelers should not be held liable on the basis of principles of equity. Specifically, the WCAC essentially concluded that it would be unfair to hold Travelers liable for plaintiff's benefits where the original parties to the action did not take steps to formally join Travelers as a party. However, the WCAC has observed in another context that the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., does not require the mandatory joinder of parties. *Hubbard v Laidlaw Transit Co*, 2000 ACO 406.

In this case, a review of the record reveals that Commercial Union's delay in filing a petition to determine Travelers' liability was excusable and not attributable to a lack of due diligence. For example, it is clear that the bureau repeatedly told the parties that NSI was not insured at the time of the accident and failed to notify Travelers of its involvement, in spite of telling the parties of its intention to do so. The record is clear that Commercial Union attempted to join Travelers as a defendant once it received confirmation of Travelers' potential liability. Although Travelers did not participate in the initial trial determining whether plaintiff was entitled to wage loss benefits, in our view its' interests were adequately represented by Commercial Union because at that time Commercial Union thought it was the carrier on the risk. Travelers has therefore not shown prejudice as a result of the lack of notice. Further, Travelers' has failed to direct our attention to reported authority supporting its proposition that it may not be held liable for wage loss benefits where it was not a party to the original hearing.

Finally, we reject Travelers' assertion that the law of the case doctrine is applicable under the circumstances of this case. The law of the case doctrine only applies if the facts have remained materially the same. *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). In this case, there was a mutual mistake of fact with regard to the carrier on the risk for NSI at the time the accident occurred, a mistake that was the result of the bureau's own misinformation. Where the mistake was discovered and the parties subsequently stipulated to the correct facts, the law of the case doctrine does not require that the stipulation be ignored.

Accordingly, we reverse the portion of the WCAC's opinion to the extent that it concludes that Travelers is not liable for payment of plaintiff's benefits and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Peter D. O'Connell